Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

RONALD G. DODDS,
Petitioner,

v.

HALLIBURTON ENERGY SERVICES, INC.,
Respondent.

LUIS PICOT,
Petitioner,

v.

HALLIBURTON ENERGY SERVICES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court's decision in *Oubre v. Entergy Operations, Inc.*, 118 S.Ct. 838, 522 U.S.422 (1998) require that all waivers of rights or claims under the ADEA, including the right to a jury trial, satisfy the Older Worker's Benefit Protection Act (OWBPA), as the case holds and as followed by the Ninth Circuit, or is it instead restricted to the "wholesale release of substantive rights only," as held by the Fifth Circuit?

2. Under Texas law, is an employer's unilateral notice of binding arbitration that can be unilaterally abolished, made as a condition of continued at-will employment, a valid agreement where the employees are terminated shortly before their retirement vests after a long tenure of service?

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IN THE
SUPREME COURT OF THE UNITED STATES

RONALD G. DODDS,

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V.

HALLIBURTON ENERGY SERVICES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RONALD G. DODDS and LUIS PICOT, Petitioners, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Petitioners brought separate suits in the United States District Court for the Southern District of Texas, alleging causes of action under the ADEA and other statutes against Halliburton Energy Services, Inc. Petitioners claim they were terminated by Halliburton because of their age and to avoid their retirement vesting.

In response, Halliburton filed a motion in each case requesting the court to compel arbitration of all of Petitioners' claims and to either stay or dismiss the actions. The trial court granted the motion and dismissed each case. These opinions are not reported.

Petitioners filed separate appeals with the Fifth Circuit Court of Appeals, where the cases were consolidated for decision. On August 29, 2001, the Fifth Circuit entered a *per curiam* decision, affirming the district court judgments. This decision is also unreported.

JURISDICTION

Subject matter jurisdiction for the United States District Court for the Southern District of Texas is found in the Age Discrimination in Employment Act of 1967, 29 U.S.C. §626(b) and ERISA, 29 U.S.C. §1132. The district court judgments were entered on December 18, 2000 (Dodds) and March 30, 2001 (Picot).

Subject matter jurisdiction for the Court of Appeals for the Fifth Circuit was invoked through 28 U.S.C. § 1291, because it was an appeal from a final judgment of a United States District Court, as well as 9 U.S.C. §16 (a)(3), because it was an appeal from a final decision with respect to an arbitration that is subject to the Federal Arbitration Act, 9 U.S.C. §§ 1, et seq. Petitioners' Motion for Rehearing was denied on October 12, 2001.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The Older Worker's Benefit Protection Act (OWBPA)
29 U.S.C. § 626(f)(1):

An individual may not waive ***any right or claim*** under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to the rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange of consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to execution of the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; (ii) if a wavier is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least

45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation has expired.

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to–

(i) any class, unit , or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Id. (emphasis added).

STATEMENT OF THE CASE

Ronald Dodds and Luis Picot and were each employed with Halliburton Energy Services at its Victoria, Texas plant. Dodds was employed for twenty-two years and Picot for just under nineteen. At the age of 50 and within two months of his retirement vesting, Halliburton fired Dodds. At the age of 56 and less than one month of his retirement vesting, Halliburton fired Picot.

Dodds was fired on November 11, 1998, and Picot on November 12, 1998. That same year, Halliburton began a policy for handling employee disputes and/or grievances called the Halliburton Dispute Resolution Program (DRP). Halliburton sent notice to its employees, including Dodds and Picot, that if an employee continued working at Halliburton after the effective date of January 1, 1998, he or she would be agreeing to resolve all legal claims against Halliburton "through this process instead of going to the court system." After receiving this notice, Dodds and Picot continued working at Halliburton until they were terminated.

After twenty-two year of service, including thirteen merit raises and four promotions, Dodds was terminated for the stated reason of "not completing paperwork, not turning in paperwork, and declining production." Had Dodds continued working for two more months, he could have retired and received his pension and health benefits as a retiree.

After nearly nineteen years of service, including no disciplinary actions and numerous letters of commendation from his customers, Picot was terminated for the stated reason of "not completing paperwork, not turning in paperwork, and declining production." Had Picot continued working for two more months, he could have retired and received his pension and health benefits as a retiree.

Dodds and Picot filed separate suits under the ADEA and other statutes, claiming that they were terminated

because of their age and to avoid their retirement vesting. In response, Halliburton filed a motion requesting the court to compel arbitration of all of the Petitioners' claims and to either stay or dismiss the actions. The trial court complied, and the Fifth Circuit affirmed.

REASONS FOR GRANTING WRIT

I. *The Fifth Circuit's Decision is in Conflict with the Plain Language of the OWBPA, this Court's Holding in Oubre v. Entergy Operations, Inc. and a Decision of the Ninth Circuit.*

A. Haliburton's Arbitration Agreement Violates the Requirements of the Older Workers Benefit Act of 1990 for Valid Waivers of Rights and Claims Under the ADEA.

The Fifth Circuit's decision in this case is in direct conflict with, not only the statute in question, the OWBPA, but a decision of this Court and a decision from the Ninth Circuit. The issue involved is an important one that could potentially affect thousands of persons nationwide as large employers continue to adopt Mandatory Dispute Resolution Programs and terminate older employees. This important question of federal law should be settled by this Court.

Halliburton claims that its notice to Petitioners of its mandatory Dispute Resolution Program (DRP) constitutes a valid waiver of Petitioners' ADEA rights to a jury trial and to the court system. Congress, however, has mandated that it does not.

The Older Worker's Benefit Act of 1990 (OWBPA) provides: "An individual may not waive ***any [ADEA] claim***...unless the waiver is knowing and voluntary...[A] waiver may not be considered knowing and voluntary unless at a minimum" it satisfies certain enumerated requirements. *See* 29 U.S.C. § 626(f)(1).

It is undisputed in this case, first, that Dodds and Picot are covered by the OWBPA by virtue of their ages (50 and 56, respectively), and second, that Halliburton's notice does not comply with the Act's requirements. Instead, Halliburton, the trial court, and the Fifth Circuit take the position that the Act does not apply to arbitration agreements at all, but only to wholesale release of ADEA claims, and nothing less.

As authority for this position, the Fifth Circuit relies on its 1995 case holding that the Act does not apply to arbitration agreements, but to severance agreements only, and that it protects only against the wholesale waiver of substantive rights, not the waiver of a "judicial forum" in which to assert those rights. *See Williams v. CIGNA Fin. Advisors, Inc.*, 56 F.3d 656, 660-61 (5th Cir. 1995).

The problem with this reliance is that this restricted interpretation of the Act has been rejected by this Court and is contrary to the plain language of the statute. In 1998, after the Fifth Circuit's 1995 decision in *Williams*, this Court decided the case of *Oubre v. Entergy Operations, Inc.*, 118 S.Ct. 838, 522 U.S.422 (1998). In *Oubre*, the High Court rejected the Fifth Circuit's interpretation of the Act, holding that the doctrines of ratification and estoppel could not overcome the clear directive of the OWBPA legislation.

In *Oubre*, the employee entered into a severance agreement with her employer that included a release and waiver of all of her claims. It was undisputed by the parties that the release did not comply with the release requirements of the OWBPA. The employer, however, argued that general contract principles of ratification and estoppel preempted these requirements.

This Court disagreed, holding that the statutory command is clear "that ***any waiver of rights or claims under the ADEA*** must satisfy the OWBPA requirements: The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound

to take Congress at its word. Congress imposed specific duties on employers who seek releases of certain claims created by statute. ...Courts cannot with ease presume ratification of that which Congress forbids" (emphasis added). *See* 552 U.S. at 427; 118 S.Ct. at 841; *see also, Hodge v. New York College of Podiatric Medicine*, 157 F.3d 164 (2nd Cir. 1998)("[I]n light of *Oubre*... appellant's performance and acceptance of benefits did not ratify the otherwise invalid agreement); *Tung v. Texaco Inc.*, 150 F.3d 206 (2nd Cir. 1998.)

At least one appellate court has interpreted *Oubre* to mean that the OWBPA requires the waiver of a jury trial under the ADEA to meet the statutory requirements. *See Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1193-94 n.5 (9th Cir. 1998)("Congress amended the ADEA to provide that all waivers of rights under the Act, apparently including the right to a jury trial, *29 U.S.C. § 626(c)*, must be 'knowing and voluntary,'" *citing Oubre).*

To restrict OWBPA's application to severance agreements only, or to a wholesale release of substantive rights only, would be in direct violation of the strict construction the Supreme Court has given this statute in *Oubre*. The Fifth Circuit's decision in *Williams* attempts to engraft words into the statute that it does not have and that Congress did not intend it to have. Nothing in the statute indicates that it applies only to severance agreements releasing wholesale substantive rights, and to no other, but instead refers to "*any* waiver or release" and to "*any* right and claim under the ADEA." *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)("Having made the bargain to arbitrate, the party should be held to it *unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.")*(decided prior to *Oubre)*(emphasis added*)*. It would have been a very easy and simple task to add the words suggested by *Williams* to the statute, had Congress intended to.

As stated by this Court, the policy of the Act is "clear from its title: It is designed to protect the rights and benefits of older workers." *See* 552 U.S. at 426-72; 118 S.Ct. at 841. The statute does not indicate that Congress intended to protect older workers waiving their ADEA claims in severance agreements only, as opposed to other agreements that could affect their benefits. Nor does it indicate Congress' intention to protect them only if they are waiving all of their rights, as opposed to their right to a jury trial in the courts of this country. In short, nothing in the statute indicates an intention on the part of Congress that the Act's language not be afforded its plain meaning.

The right to a jury trial in an ADEA case is one that Congress has affirmatively and unambiguously granted by statute. *See* 29 U.S.C. §626(c)7(c); *Lehman v. Nakshian*, 453 U.S. 156, 101 S.Ct. 2698, 2702 69 L.Ed.2d 548 (1981). Strict compliance with each provision of the OWBPA is necessary, as a release cannot be deemed knowing and voluntary unless all of the technical requirements of the OWBPA have first been satisfied. *Id.*

As in *Oubre*, no dispute exists whether the "release" claimed by Halliburton satisfies the requirements of releases and waivers under the OWBPA. Halliburton's notice failed to advise Dodds and Picot to seek legal counsel with regard to reviewing, agreeing to, rejecting or otherwise understanding Halliburton's DRP; it was mandatory and did not allow for options, choices, or negotiations or revocation; Dodds and Picot were never offered any consideration for "agreeing" to be bound by the DRP or for waiving their ADEA right to a jury trial; and they were not given any waiting periods for consideration of the "agreement," or for revoking the "agreement." No doubt exists, then, but that Dodd's and Picot's waivers were not knowing and voluntary under the OWBPA. It cannot, therefore, be used to shield Halliburton from Dodd's and Picot's ADEA claims. *See Oubre*, at 552 U.S. 428, 118 S.Ct. at 842.

Because the United States Supreme Court has held that the OWBPA must be strictly construed to comply with Congress' clear intent to protect older workers, the Fifth Circuit was not bound by the precedent of *Williams* and was bound, instead, to reverse the trial court in this case. Ronald G. Dodds and Luis Picot deserve their day in court.

B. Halliburton's Agreement to Arbitrate is Unenforceable under Texas Law.

Independent of the issue of its violation of the OWBPA, Halliburton's arbitration notice is not enforceable for the reason that it is not an agreement at all under Texas law.

The Federal Arbitration Act (the FAA) governs arbitration agreements made in contracts involving commerce. *See* 9 U.S.C. §1. In deciding whether a particular dispute must be arbitrated, the Fifth Circuit first determines whether the parties agreed to arbitrate the dispute in question. *See Webb v. Investacorp., Inc.*, 89 F.3d 252, 257-58 (5th Cir. 1996). This determination involves considering whether a valid agreement between the parties exists. *Id.*

Although the trial court and Fifth Circuit opinions acknowledge that Texas law governs the formation of any alleged agreement between Dodds, Picot and Halliburton, they proceed to misinterpret Texas law in concluding that such contracts exist.

Under Texas law, a valid agreement must have mutuality of obligation. An illusory promise is a promise that fails to bind the promisor, who retains the option of discontinuing performance. *See O'Farrill Avila v. Gonzalez*, 974 S.W.2d 237 (Tex. App. – San Antonio 1998, pet. denied). When illusory promises are all that support a purported bilateral contract, there is no contract. *See Tenet Healthcare Ltd v. Cooper*, 960 S.W.2d 386 (Tex. App. – Houston [14th Dist.] 1998, review dismissed w.o.j.).

In the present case, Halliburton attempted to bind Dodds and Picot to arbitration while at the same time allowing itself the unfettered control to change, modify, or out-right abolish the "agreement," creating at most an illusory promise. In fact, when Halliburton purportedly had a problem with Dodd's and Picot's job performance, it did not subject its dispute to arbitration, but proceeded to fire Dodds and Picot without any attempt to resolve the dispute through its DRP. Even Halliburton, then, treated the arbitration "agreement" as one-sided.

Under Texas law, the promise of at-will-employment is no promise at all. "Consideration for a promise, by either the employee or the employer in an at-will employment, cannot be dependent on a period of continued employment. Such a promise would be illusory because it fails to bind the promisor who always retains the option of discontinuing employment in lieu of performance." *See Light v. Centel Cellular Company of Texas*, 883 S.W.2d 642, 644-45 (Tex 1994). The district court and Fifth Circuit's reliance on appellate court's holdings otherwise, is misplaced. Their reliance on *Hathaway v. General Mills*, 711 S.W.2d 227 (1986) is further misplaced because there, the parties had an existing agreement regarding Hathaway's compensation which the employer sought to modify. Here, no such contract existed, nor did the alleged waiver alter Dodd's or Picot's employment at-will relationship with Halliburton.

There simply was no consideration to support the alleged agreement. The Texas Supreme Court held in *Federal Express Corp v. Dutschmann*, 846 S.W.2d 282, 283 (1993) that as a matter of law, an employee handbook that could be changed by the company at its own discretion did not create a contract. In the case at bar, Halliburton did not bind itself to anything. Its DRP clearly and unequivocally states that the program could be terminated unilaterally at Halliburton's discretion. The fact that it required ten days notice for such termination or agreed to pay for attorney's fees if the employee used an attorney of Halliburton's choice cannot resurrect the illusory promise into consideration. A promise

which an employer can take away on a whim is no promise at all, it is "illusory because it fails to bind the promisor." *See Light*, 883 S.W.2d at 644-45.

The trial court and Fifth Circuit's analysis in nevertheless finding a contract is fatally flawed and is directly at odds with Texas law. They base their conclusion on the fact that an at-will employment agreement can be modified. While this is true, no modification occurred here, because there was no consideration for any new, modified contract. Continuing to work after notice of a change in working conditions does not constitute sufficient consideration when the employee is still at-will. At-will employment is not sufficient consideration, whether it is at the inception of the employment, or later when the employment conditions are "modified". Under the Fifth Circuit's flawed reasoning, what is insufficient consideration at one time magically converts to sufficient consideration at another.

In fact, "agreements" reached under the circumstances as here are unenforceable in Texas as unconscionable. The "agreements" between Halliburton and Dodds and Picot were made between parties of unequal bargaining power, without the benefit of preagreement bargaining, and required Petitioners to relinquish valuable legal rights. *See In re Turner Bros. Trucking Co., Inc.*, 8 S.W.2d 370 (Tex. App. – Texarkana, 199, orig. proceeding.) Halliburton, in turn, did not give up its right to terminate Dodds and Picot at its whim or to terminate the DRP at its whim. It gave Dodds and Picot, who were a short time away from retirement, a classic "Hobson's choice" of continuing to work and accepting the DRP without the protections and rights secured by Congress and the State of Texas, or of resigning after nineteen and twenty-two years of service, losing their pension and health benefits, and "starting over" at the ages of fifty and fifty-six. Clearly, this was no choice at all.

CONCLUSION

Under both State and Federal law, the alleged agreements to arbitrate sought to be enforced in this case by Halliburton, must fail. Even were they otherwise valid waivers or releases, they are unenforceable under the Older Workers Benefit Protection Act for their failure to meet the Act's requirements of a knowing and voluntary waiver. In any event, they are not agreements at all, but illusions of a promise that Halliburton was not bound to keep.

The injustice of enforcing such an involuntary arbitration provision is especially apparent in this case, where two hard-working, productive employees finally reach retirement age and have the security for which they worked so hard swept away at the whim of their employer to whom they devoted themselves for nineteen and twenty-two years. Clearly, this was not the intent either of Congress, or of the State of Texas, and should not be sanctioned by this Court.

THEREFORE, Petitioners Ronald G. Dodds and Luis Picot request of this Court that it GRANT its Petition for a Writ of Certiorari to the Untied States Court of Appeals fo the Fifth Circuit.

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(Any footnotes trail end of each document)
Nos. 01-40057 and 01-40462
Summary Calendar

IN THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

RONALD G. DODDS,
Plaintiff-Appellant

v.

HALLIBURTON ENERGY SERVICES, INC.,
Defendant-Appellee.

LUIS PICOT,
Plaintiff-Counter Defendant-Appellant,

v.

HALLIBURTON ENERGY SERVICES, INC.,
Defendant-Counter Claimant-Appellee

Appeals from the United States District Court
For the Southern District of Texas
(V-00-CV-71 & V-00-CV-96)

Entered: August 29, 2001

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Ronald Dodds and Luis Picot appeal the district court's dismissal and order to compel arbitration of their claims under the Age Discrimination in Employment Act (ADEA).[1] We have jurisdiction as this is an appeal from a "final decision with respect to an arbitration."[2] Because Appellants' claims cannot succeed under controlling precedents of this Court and Texas law, we affirm.

I

Luis Picot and Ronald Dodds were both employed at the Victoria, Texas facility of Halliburton Energy Services ("Halliburton"). Both were terminated shortly before their pensions would have vested. Picot wag 56 years old when he was terminated; Dodds was 50. The same year that they were terminated, Halliburton adopted the "Halliburton Dispute Resolution Program" (DRP) for handling employee grievances and disputes. Halliburton sent notice and details of the DRP to its employees and indicated that employees who continued to wont at Halliburton after the DRP's effective date of January 1, 1998, would have accepted the DRP, which required all legal claims against Halliburton to be resolved through its procedures.

Picot and Dodds, after their respective terminations, filed suit under the ADEA, claiming that they were terminated in order to avoid the vesting of their pensions with Halliburton. The district count in both cases granted Halliburton's motion to compel arbitration and dismissed the claim.

II

We review a district court's order to compel arbitration de novo.[3]

Appellants first argue that the DRP represents a "waiver" of their age discrimination claims and does not satisfy the Older Worker's Benefit Protection Acts (OWBPA) requirements for such a waiver. The OWBPA provides that "[a]n individual may not waive any right or claim under this chapter unless the

waiver is knowing and voluntary."[4] The OWBPA then delineates the "minimum" requirements of such a waiver including, among other things, that such a waiver be in writing, that it be between the individual and the employer, and that it specifically refer to rights or claims arising under the ADEA.[5] Halliburton's notice with respect to the DRP does not comply with all of these requirements of the OWBPA.[6]

This Court, in Williams v. CIGNA Financial Advisors, Inc.,[7] previously determined that the OWBPA's requirement of knowing and voluntary waiver does not apply to arbitration agreements but instead is directed at severance agreements and releases.[8] Thus under Williams, the DRP is not subject to the requirements of the OWBPA and. Appellants must pursue their remedies through the DRP.

Appellants argue, however, that Williams has been effectively overruled by the Supreme Court's decision in Oubre v. Entergy Operations, Inc.[9] In Oubre, the Court considered an employee's severance agreement releasing all claims against her employer, Including ADEA claims. The Court held that despite the fact that the plaintiff had accepted severance payments, waiver of ADEA claims required strict compliance with the requirements of the OWBPA.

The Court, however, did not address pre-dispute waivers in Oubre. Moreover, the Court clearly focused on waivers of substantive rights guaranteed by the ADEA, not procedural rights, holding that "[t]he statutory command is clear: An employee 'may not waive' an ADEA claim unless the waiver or release satisfies the OWBPA's requirements."[10] As the First Circuit has noted, to the extent that Oubre bears on this question, it suggests by use of the term "claims" that the waiver provisions of the OWBPA apply only to substantive rights.[11] "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum . . .we must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial

forum, that intention will be deducible from text or legislative history."[12] In Williams we found no evidence of Congressional intent to include the right to a judicial forum in the waiver protections provided by the OWBPA. Oubre does not affect that conclusion.

Additionally, to interpret the OWBPA to apply to the procedural right to a jury trial would mean that we must hold that OWBPA prohibits pre-dispute arbitration agreements altogether, as we noted in Williams.[13] Again, Appellants must demonstrate that Congress clearly intended such a result, and they have not.[14]

III

Appellants' remaining arguments consist of doomed state law claims that the arbitration agreement is void for lack of consideration and as unconscionable. We agree with the district court that the DRP agreement is supported by consideration-the mutual promise to arbitrate-and that Halliburton's promise is not illusory because amendment or termination of the agreement by Halliburton requires a 10 day advance notice to be given.[15] The defendant's assertion that the arbitration agreement is unconscionable is similarly without merit.[16]

IV

For the foregoing reasons, the judgment of the district court is AFFIRMED.

Footnotes

* Pursuant to 5th Cir. R. 47.5 the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

[1] 29 U.S.C. §626 et seq.

[2] 9 U.S.C. § 16(a) (3) See Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 85-87 (2000).

[3] Local 1351 Int'l Longshoremen's Ass'n v. Sea Land Serv., Inc., 214 F.3d 566, S69 (5th Cir. 2000).

[4] 29 U.S.C. § 626(f) (1).

[5] Id.

[6] The notice, for example, did not "advise" in writing to consult with counsel." 29 U.S.C. § 626(f) (1) (E). Halliburton remarks that notice of the DRP complied with some of the OWBPA's requirements, hut the plain text and the court's decision in Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998), require strict compliance.

[7] 56 F.3d 656 (5th Cir. 1995) (Higginbotham, J.)

[8] Id at 660-61 ("We recognize that Congress, through the OWBPA, has protected terminated employees who waive their substantive rights under ADEA in exchange f or a more favorable severance package; however, we find no clear indication that Congress was likewise concerned with protecting employees who agree to arbitrate claims that may arise during the course of their employment."). The First and Third Circuits have agreed with this approach. See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 12-13 (1st Cir. 1991; Seus v. John Nuveen & Co., 146 F.3d 175, 181-82 (3d Cir. 1998). But see Duffield v. Robertson Stephenson & Co., 144 F.3d fl82. 1190 n. 4 (9th dir. 1998) (remarking that 'current ADEA claims may require different treatment' from those arising before the enactment of the OWBPA).

[9] 522 U.S. 422 (1998).

[10] Id. at 426-27 (emphasis added).

[11] Rosenberg, 170 F.3d at 13.

[12] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 628 (1985) . see also Gilmer v. Interstate/Johnson Lane Corp, 500 U.S. 20, 29 (1991) ("Congress ... did not explicitly preclude arbitration . . . in [the OWBPA]. . ..").

[13] Williams, 56 F.3d at 661. This is because under the OWBPA an employee cannot waive rights or claims that may arise after the date the waiver is executed. 29 U.S.C. § 626(f) (1) (C)

[14] Williams, 56 F.3d at 661, citing Gilmer, 500 U.S. at 26 (placing burden of showing that "Congress intended to preclude a waiver of a judicial forum for ADEA claims" on party seeking to avoid arbitration)

[15] See In re Alamo Lumber Company, 23 S.W. 3d 577 (Tex. App.-San Antonio 2000) (holding that arbitration agreement was supported by consideration of mutual promise to arbitrate claims). Cf. J.M. Davidson, Inc. v. Webster, No. 13-00-626-CV, 2001. WL 587037 (Tex. App.—Corpus Christi May 31, 2001) (holding arbitration agreement void for lack of consideration where employer reserved right to unilaterally abolish or change personnel policy without notice).

[16] See In re Oakwood Mobile Homes, Inc., 987 S.W.2d 571 (Tex. 1999) (holding that arbitration agreement was not unconscionable because of unequal bargaining power between parties).

CIVIL ACTION NO. V-00-96

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHER DISTRICT OF TEXAS VICTORIA DIVISION

LUIS PICOT,
Plaintiff,

v.

HALLIBURTON ENERGY SERVICES, INC.,
Defendant.

Entered: March 30, 2001

ORDER

Pending before the Court is Defendant Halliburton Energy Services, Inc. ("Halliburton")'s motion to compel arbitration and to dismiss or stay this action pending such arbitration (Dkt. # 8). After considering the motion, response, reply, and applicable law, the Court is of the opinion that Defendant's motion should be GRANTED.

FACTUAL BACKGROUND

Plaintiff Luis Picot ("Picot") was employed by Halliburton as a field engineer in its Victoria, Texas facility. In December 1997 and again in the Spring of 1998, Halliburton mailed to Picot a copy of its Dispute Resolution Program ("DRP") that contained an arbitration agreement. The DRP documents notified Picot that continuing his employment with Halliburton would constitute acceptance of the arbitration agreement's terms. This agreement included the following provision:

> If you choose to accept employment or continue your employment with any Halliburton company, you will have agreed to all provisions under the Dispute Resolution

> Program. This includes the requirement under the Program that any legal dispute between you and your employer be submitted to final and binding arbitration.

(DRP at 22).

In November 1998, Picot was terminated from his position with Halliburton. On November 7, 2000, Plaintiff filed this action, claiming that his termination was based on his age and the projected expenses of his retirement benefits, which were scheduled to vest approximately two months after his termination date. Halliburton seeks to enforce the arbitration agreement. Picot contends that this agreement is not binding.

DISCUSSION

The Federal Arbitration Act ("FAA") governs arbitration agreements made in contracts involving commerce. 9 U.S.C. § 1 (West Supp. 2000). Section 2 of the FAA makes a written arbitration provision in a contract "valid, irrevocable, aid enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" Under § 4 if a party to an agreement refuses to arbitrate, the opposing party may bring an action to compel arbitration, and the court shall direct the parties to arbitrate if the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue."

According to the Fifth Circuit, the framework for deciding whether to grant a motion to compel arbitration under the Federal Arbitration Act requires a two-part inquiry. See Webb v. Investacorp, Inc. 89 F. 3d 252,257-58(5th Cir 1996); R.M. Perez & Assoc., Inc. v. Welch, 960 F.2d 534,538(5th Cir 1992). The first step is for the court to determine whether the panics agreed to arbitrate the dispute in question See Webb, 89 F.3d at 258 (citing Mitsubishi Motors Corp. Soler Chrysler-Plymouth, Inc., 473 U.S. 614,626 (1985)). This determination involves considering; (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute

in question falls within the scope of that arbitration agreement Id. In deciding whether the parties agreed to arbitrate the dispute, courts should apply general state law principles governing contract formation. Id. (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995)). However, the court must give due regard to the federal policy favoring arbitration, and should resolve ambiguities regarding the scope of the arbitration clause in favor of arbitration. Id. (quoting Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ. 489 U.S. 468, 475-76 (1989)).

I. Enforceability of the Arbitration Agreement

Neither party disputes that the present action falls within the scope of the arbitration agreement, if the agreement itself is valid. Instead, Picot raises numerous objections to the agreement's enforceability.

A. Whether the Federal Arbitration Act coven the arbitration agreement

First, Picot argues that the arbitration agreement is not within the pm-view of the Federal Arbitration Act. In support of this argument, Pica cites Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999).[1] In Circuit City, the Ninth Circuit held that the Federal Arbitration Act does not apply to employment contacts. See id. (citing Craft v. Campbell Soup Co. 177 F.3d 1083, 1094(9th Cir.1999)).

Controlling Fifth Circuit precedent, however, holds that employment contracts, not specifically excluded in 9 U.S.C. § 1,[2] are covered by the FAA. See Miller v. Public Storage Mgmt., Inc., 121 F.3d 215, 219(5th Cir. 1997); Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996). The U.S. Supreme Court has now endorsed the Fifth Circuit's approach. Circuit City Stores, Inc., v. Adams, 2001 WL 273205 (U.S.) at *12.

Picot's employment as field engineer is not specifically excluded from FAA coverage Consequently, under Fifth

Circuit precedent, the FAA applies to the arbitration agreement unless some other exclusion exists. See Rojas, 87 F3d at 748.[3]

Picot also contends that even if employment contracts are not specifically excluded from the FAA, Halliburton's employment of Pica is not covered because at-will employment is not a "contract evidencing a transaction involving commerce," as required by 9 U.S.C. § 2 This argument also fails, since the FAA has been consistently applied to at-will employment relationships. See Patterson, 113 F.3d at 834-35; Flynn v. Aerchem, Inc., 102 F. Supp.2d 1055, 1061 (S.D. Ind. 2000). Sec also In re Jebbia, 26 S.W.3d 753, 758 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); In re Alamo Lumber Co., 23 S.W.3d 577, 579-80 (Tex.App.–San Antonio 2000, no writ).

B. Whether the arbitration agreement is a valid contract under Texas law.

Picot raises numerous objections to the validity of the arbitration agreement under Texas law. In evaluating an arbitration agreement's validity, the court must refer to general principles of contract law, See Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681,686-87(1996). However, if state law routes special rules for arbitration agreements that do not generally apply to all contracts, it is "inconstant with, and is therefore preempted by, the federal [act]" Id at 688.

Picot contends that because he never signed the arbitration agreement, it is not binding on him. Contrary to Picot assertion, 9 U.S.C. § 3 requires that arbitration agreements be in writing, but it does not require a signature. See Valero Refining, Inc. v. M/T Lauberhorn 813 F.2d 60, 63-64(5th Cit 1987) ("It is established that a party may be bound by an agreement to arbitrate even in the absence of his signature.") (citations omitted). The agreement disputed in the case at bar clearly is in writing as required by the FAA.

Likewise, under Texas contract law, modifications to at-will employment terms may be enforced, even when the panics have not signed a formal agreement. See Hathaway v. General Mills. Inc., 711 S.W.2d 227,229 (Tex.1986); Circuit City Stores. Inc. v. Curry, 946 S.W.2d 486, 488 (Tex.App.–Fort Worth 1997, no writ); Burlington Northern A. Co. v. Akpan, 943 S.W.2d 48, 50 (Tex.App.-Fort Worth 1996, no writ). To show that a modification to an at-will employment agreement 15 valid, a party must "prove two things: (1) notice of the change and (2) acceptance of the change." Hathaway, 711 S.W.2d at 229. To prove notice Halliburton must demonstrate that it "unequivocally notified the employee of definite changes in employment terms." Id. In the present action, t is undisputed that Halliburton mailed and Picot received the DRP, which included the arbitration agreement.[4] The DRP was sufficiently clear to notify Picot that he would be bound by the arbitration agreement (the continued working for Halliburton. Thus, the DRP satisfied the notice requirement laid out in Hathaway. See Id; In re Alamo Lumber Co., 23 S.W.3d 577, 580 (Tex.App–San Antonio 2000, no writ).

The second requirement to modify at-will employment terms under Hathaway is that, "[t]he employer asserting a modification must also prove that the employee accepted the proposed changes. If the employer proves that he has unequivocally notified the employee of the changes, the employee's continuing employment Will constitute acceptance as a matter of law." Hathaway, ill S.W.2d at 229. Picot received notice of the proposed changes in employment at- will and continued working. Consequently, he is deemed to have accepted the change in the terms of his at-will employment.

Picot next contends that there was no consideration given for the agreement to arbitrate. However, when both parties to an at-will employment contact agree to be bound by an arbitration agreement, this constitutes valid consideration under Texas law. See In re Jebbia, 26 S.W.3d 753, 758 (Tex. App.-Houston [14th Dist.] 2000, pet. denied); in ye Alamo Lumber Co., 23 S.W.3d at 579-80. See also Michalski, 177 F.34

at 637; Patterson, 113 F.3d at 835 Both Halliburton and Picot are bound to arbitrate disputes between the parties.[5] Consequently, valid consideration exists to make the arbitration agreement enforceable.

Pica also asserts that Halliburton is not mutually bound to arbitrate, because it can cancel the arbitration agreement whenever it chooses to do so. This argument misstates Halliburton's rights under the arbitration agreement Any change to the agreement applies only to disputes or proceedings initiated after the date of amendment or termination. In addition, Halliburton must give 10 days notice before canceling the agreement While Halliburton may cancel the arbitration agreement after giving notice, it may not eliminate the right to arbitrate a previously initiated dispute. Thus, Halliburton is mutually bound to arbitrate disputes initiated While the arbitration agreement is in effect See Morrison v. Circuit City Stores, Inc., 70 F, Supp.2d 815, 823-24 (S.D. Ohio 1999).

Picot also claims that if he agreed to arbitrate, he did so under duress, since quitting his employment would have jeopardized his pension that was only two years from vesting at the time the arbitration agreement was added to the employment terms. Under Texas law, "[d]uress is a threat to do some act which the threatening party has no legal right to do." Tenneco Oil Co. v. Gulsby Eng'g. Inc., 846 S.W.2d 599,604 (Tex.App.–Hous. [14 Dist] 1993, writ denied). As discussed above, Halliburton has the legal right to add an arbitration agreement to the employment tents. Satin it Oakwood Mobile Homes, 987 S.W.2d 571,574 (Tex. 1999). To require Neat to abide by such an agreement does not constitute duress. See id.

Picot also alleges that the arbitration agreement was procured by fraud. However, Picot fails to plead fraud with the particularity required by Rule 9(b) of the Federal Rides of Civil Procedure. The most specific allegations of fraud made by Picot are the following:

> upon information arid belief, . Defendant intentionally lied about the nature of the DRI in order to entice employees to accept the program while knowing it was designed and would be used to violate many of its employees civil rights.

(Response ¶ 45; Affidavit of Luis Picot ¶ 26). These general assertions do not approach the particularity required topical fraud. See Williams v. WMX Technologies, Inc., 112 F.3d 175, 177-78 (5th Cir. 1997) (citing Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir. 1993) ("[A]rticulating the elements of fraud with particularity requires a plaintiff to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent."); Young v. Nationwide Life Ins. CO., 2 F.Supp.2d 914,922 S.D.Tex.1998) (ruling that pleading fraud requires more than "rote conclusory allegations that the defendants knowingly did this or recklessly did that") (citations omitted).

C. Whether the Older Worker, Benefit Act of 1990 applies.

Picot's final argument is that the arbitration agreement violates the Older Workers Benefit Act of 1990 ("OWBPA") 29 U.S.C. § 62.6. Picot cites to Ninth Circuit cases in support of his argument. See Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1193-94 (9th Cir. 1998);.Renteria v. Prudential Ins. Co. of America, 113 F.3d 1104,1105-06 (9th Cir. 1997); Prudential Ins. Co. of America v. Lai 42 F.3d 1299, 1305 (9th Cir. 1994). However, Picot acknowledges that the Fifth Circuit disagrees with the Ninth Circuit's interpretation of the OWBPA and has held that (1) Congress did not intend the OWBPA to apply to arbitration agreement; but rather severance agreements; and (2) that the OWBPA protects only against wholesale waiver of substantive rights, not the waiver of a judicial forum in which to assert those rights. See Williams v. CIGNA Fin. Advisors, Inc., 56 F.3d 656, 660-61 (5th Cir. 1995); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229

(5th Cir 1991). This Court is required to follow Fifth Circuit precedent. Consequently, Picot's claim that the agreement to arbitrate violates the OWRPA must fail.

CONCLUSION

Based on the foregoing analysis, Halliburton's motion to compel arbitration and dismiss or stay this action pending such arbitration is GRANTED. This action is DISMISSED, and Picot shall pursue his claims against Halliburton, if at all, pursuant to the arbitration agreement.

It is so ORDERED.

Signed this 28th day of March, 2001.
JOHN D. RAINEY
STATES DISTRICT JUDGE

Footnotes

[1] The U.S. Supreme Court recently reversed the Ninth Circuit's holding in Circuit City.
2001 WL 273205 (U.S.).

[2] Section 1 of the FAA states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The Rojas Court interpreted this language as follows: [T]he exclusionary clause of § I of the Arbitration Act should be narrowly construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are." 87 F.3d at 748 (quoting Asplundh Tree Expert Co. v. Bates, 71 F.3d 592(6th Cir 1995)). Pica is not an employee involved in the movement of goods in interstate commerce. Consequently, he is not excluded from FAA coverage under Section 1. See id.

[3] Picot also requests that if this Court chooses to follow Fifth Circuit precedent over Ninth Circuit precedent that it delay ruling on the motion to compel arbitration until the Supreme Court has addressed Circuit City. The U.S. Supreme Court has decided the issue and endorsed the Fifth Circuit's approach.

[4] Although Plaintiff denies signing or negotiating for the arbitration agreement, he fails to deny having received it.

[5] Halliburton also offers additional consideration such as $2,500 annually as reimbursement for legal fees incurred in connection with claims brought under the arbitration agreement.

CIVIL ACTION NO. V-00-71

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHER DISTRICT OF TEXAS VICTORIA DIVISION

RONALD G. DODDS,
Plaintiff,

v.

HALLIBURTON ENERGY SERVICES, INC.,
Defendant.

Entered: December 18, 2000

ORDER

Pending before the Court is Defendant Halliburton Energy Services, Inc. ("Halliburton")'s motion to compel arbitration and to dismiss or stay this action pending such arbitration (Dkt. # 6). After considering the motion, response, reply, and applicable law, the Court is of the opinion that Defendant's motion should be GRANTED.

FACTUAL BACKGROUND

Plaintiff Ronald G. Dodds ("Dodds") was employed by Halliburton as a field engineer in its Victoria, Texas facility. In December 1997 and again in the Spring of 1998, Halliburton mailed to Dodds a copy of its Dispute Resolution Program ("DRP") that contained an arbitration agreement. The DRP documents notified Dodds that continuing his employment with Halliburton would constitute acceptance of the arbitration agreement's terms, This agreement included the following provision:

> If you choose to accept employment or continue your employment with any Halliburton company, you will have agreed to all provisions under the Dispute Resolution

> Program. This includes the requirement under the Program that any legal dispute between you and your employer be submitted LO final and binding arbitration.

(DRP at 22).

At November 1998, Dodds was terminated from his position with Halliburton. On August 1, 2000, Plaintiff filed this action, claiming that his termination was based on his age and the projected expenses of his retirement benefits, which were scheduled to vest approximately two mouths after his termination date. Halliburton seeks to enforce the arbitration agreement. Dodds contends that this agreement is not binding.

DISCUSSION

The Federal Arbitration Act ("FAA") governs arbitration agreements made in contracts invoking commerce. 9 U.S.C. § 1 (West Supp. 2000). Section 2 of the Act makes a written arbitration provision in a contract 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," Under § 4, if a party to an agreement refuses to arbitrate, the opposing party may bring an action to compel arbitration, and the court shall direct the parties to arbitrate if the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue."

According to the Fifth Circuit, the framework for deciding whether to grant a motion to compel arbitration under the Federal Arbitration Act requires a two-part inquiry. See Webb v. Investacorp, Inc., 89 F.3d 252. 257-5 8 (5th Cir. 1996); R.M. Perez & Assoc., Inc. v. Welch, 960 F.2d 534, 538 (5th Cir. 1992). The first step is for the court to determine whether the parties agreed to arbitrate the dispute in question. See Webb, 89 F.3d at 258 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 413 U.S. 614, 626 (1985)). This determination involves considering: (1) whether there is a

valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement. Id. In deciding whether the parties agreed to arbitrate the dispute, courts should apply general state law principles governing contract formation. Id. (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995)). However, the court must give due regard to the federal policy favoring arbitration, and should resolve ambiguities regarding the scope of the arbitration clause in favor of arbitration. Id. (quoting Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468,475-76 (1989)).

I. Enforceability of the Arbitration Agreement

Neither party disputes that the present action fails within the scope of the arbitration agreement, if the agreement itself is valid. Instead, Dodds raises numerous objections to the agreement's enforceability.

A. Whether the Federal Arbitration Act coven the arbitration agreement

First, Dodds argues that the arbitration agreement is not within the purview of the Federal Arbitration Act. In support of this argument, Dodds cites Circuit City Stores, Inc v. Adams, 194 F.3d 1070 (9th Cir. 1999), cert granted, 68 USLW 3536 (U.S. May 22, 2000) (NO. 99-1379). In Circuit City, the Ninth Circuit held that the Federal Arbitration Act does not apply to employment contracts. See id. (citing Craft v. Campbell Soup Co., 177 F.3d 1083, 1094 (9th Cir. 1999)).

Controlling Fifth Circuit precedent, however, holds that employment contracts, not specifically excluded in 9 U.S.C. § 1,[1] are covered by the FAA. See Miller v. Public Storage Mgmt., Inc., 121 F.3d 215. 219 (5th Cir. 1997); Rojas v. TK Communications, Inc., 87 F. 3d 745 (5th Cir. 1996). Every other circuit to have considered the issue has taken the Fifth Circuit's position. See, e.g., Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835 (8th Cir. 1997); Great Western

Mortgage Corp. v. Peacock, 110 F.3d 222, 227 (3d Cir.1997); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1472 (D.C.Cir.1997); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 600-60 1 (6th Cir 1991): Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. l972): Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971). Dodds' employment as a field engineer is not specifically excluded from FAA coverage. Consequently, under Fifth Circuit precedent, the FAA applies to the arbitration agreement unless some other exclusion exists. See Rojas, 87 F.3d at 748.[2]

Dodds also contends that even if employment contracts are not specifically excluded from the FAA, Halliburton's employment of Dodds is not covered because at-will employment is not a "contract evidencing a transaction involving commerce," as requited by 9 U.S.C. § 2. This argument also fails, since the FAA has been consistently applied to at-will employment relationships. See Patterson. 113 F.3d at 834-35; Flynn v. Aerchem, Inc., 102 F.Supp.2d 1055, 1061 (S.D. Ind. 2000). See also In re Jehbia, 26 S.W.3d 753, 758 (Ta. App.—Houston [14th Dist.]. pet. denied); In re Alamo Lumber Co., 23 S.W.3d 577, 57940 (Tex.App.–San Antonio 2000, no writ)

B. Whether the arbitration agreement is a valid contract under Texas law

Dodds raises numerous objections to the validity of the arbitration agreement under Texas law. In evaluating an arbitration agreement's validity, the court must refer to general principles of contract Law See Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 686-87 (1996). However, if state law creates special rules for arbitration agreements that do not generally apply to all contracts, it is "inconsonant with, and is therefore preempted by, the federal [act]." Id. at S88.

Dodds contends that because he never signed the arbitration agreement it is not binding on hint Contrary to Dodds assertion, 9 U.S.C. § 3 requires that arbitration agreements be in writing, but it does not require a signature. See Valero

Refining, Inc. v. M/T Lauberhorn 813 F2d 60, 63-64 (5th Cir. 1987) ("It is established that a party may be bound by an agreement to arbitrate even in the absence of his signature.") (citations omitted). The agreement disputed in the ease at bar clearly is in writing as required by the FAA.

Likewise, under Texas contract law, modifications to at-will employment terms may be enforced, even when the parties have not signed a formal agreement. See Hathaway v. General Mills, Inc., 711 S.W.2d 227, 229 (Tex. 1 986); Circuit City Stores, Inc. v. Curry, 946 S.W.2d 486, 488 (Tcx.App.–Fort Worth 1997, no writ); Burlington Northern R. Ca v. Akpan, 943 S.W.2d 48, 50 (Tex.App.–Fort Worth 1996, no writ). To show that a modification to an at-will employment agreement is valid, a party must "prove two things: (1) notice of the change; and (2) acceptance of the change." Hathaway, 711 S.W.2d at 229. To prove notice, Halliburton must demonstrate that it "unequivocally notified the employee of definite changes in employment terms." Id. In the present action, it is undisputed that Halliburton mailed and Dodds received the DRP, which included the arbitration agreement.[3] The DRY was sufficiently clear to notify Dodds that he would be bound by the arbitration agreement if he continued working for Halliburton. Thus, the DRP satisfied the notice requirement laid out in Hathaway. See id.; In re Alamo Lumber Co., 23 S.W.3d 577, 580 (Tex.App.–San Antonio 2000, no writ).

The second requirement to modify at-will employment terms under Hathaway is that, "[t]he employer asserting a modification must also prove that the employee accepted the proposed changes. If the employer proves that he has unequivocally notified the employee of the changes, the employee's continuing employment will constitute acceptance as a matter of law." Hathaway, 711 S.W.2d at 229. Dodds received notice of the proposed changes in employment at-will and continued working. Consequently, he is deemed to have accepted the change in the terms of his at-will employment.

Dodds next contends that there was no consideration given for the agreement to arbitrate. However, when both parties to an at-will employment contract agree to be bound by an arbitration agreement, this constitutes valid consideration under Texas Jaw. See In re Jebbia, 26 SW.3d 753, 758 (Tex App—Houston [14th Dist.] pet. denied): in re Alamo Lumber Co., 23 S.W.3d at 579-80. See also Michalski, 177 F.3d at 637; Patterson, 113 F.3d at 835. Both Halliburton and Dodds are bound to arbitrate disputes between the parties.[4] Consequently, valid consideration exists to make the arbitration agreement enforceable. Dodds also asserts that Halliburton is not mutually bound to arbitrate, because it can cancel the arbitration agreement whenever it chooses to do so This argument misstates Halliburton's rights under the arbitration agreement. Any change to the agreement applies only to disputes or proceedings initiated after the date of amendment or termination. In addition, Halliburton must give 10 days notice before canceling the agreement. While Halliburton may cancel the arbitration agreement after giving notice, it may not eliminate the right to arbitrate a previously initiated dispute. Thus, Halliburton is mutually bound to arbitrate disputes initiated while the arbitration agreement in effect. See Morrison v. Circuit City Stores, Inc., 70 F. Supp.2d 815, 823-24 (S.D. Ohio 1999).

Dodds also claims that if he agreed to arbitrate, he did so under duress, since quitting his employment would have jeopardized his pension that was only two years from vesting at the time the arbitration agreement was added to the employment terms. Under Texas law, "[d]uress is a threat to do some act which the threatening party has no legal right to do." Tenneco Oil Co. v. Gulsby Eng'g, Inc., 846 S.W.2d 599, 604 (Tex.App.–Hous. [14 Dist.] 1993, writ denied). As discussed above, Halliburton has the legal right to add an arbitration agreement to the employment terms. See In re Oakwood Mobile Homes, 9S7 S.W.2d 571, 574 (Tex. 1999). To require Dodds to abide by such an agreement does not constitute duress. See id.

Dodds also alleges that the arbitration agreement was procured by fraud. However, Dodds fails to plead fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure. The most specific allegations of fraud made by Dodds ant the following:

> upon information and belief. Defendant intentionally lied about the nature of the DRP in order to entice employees to accept the program while knowing it was designed and would be used to violate many of its employees civil rights.

(Response ¶ 46; Affidavit of Ronald Dodds ¶ 17). These general assertions do not approach the particularity required to plead fraud. See Williams v. WMX Technologies, Inc.. 112 F.3d 175, 177-78 (5th Cir. 1997) (citing Mills v. Polar Molecular Corp., 12 F 3d 1170, 1175 (2d Cir. 1993) ("[A]rticulating the elements of fraud with particularity requires a plaintiff to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent."); Young v. Nationwide Life Ins. Co., 2 F.Supp.2d 914, 922 (S.D.Tex.1998) (ruling that pleading fraud requires more than "rote conclusory allegations that the defendants knowingly did this or recklessly did that.') (citations omitted).

C. Whether the Older Workers Benefit Act of 1990 applies.

Dodds' final argument is that the arbitration agreement violates the Older Workers Benefit Act of 1990 ("OWBPA"), 29 U.S.C. § 626. Dodds cites to Ninth Circuit cases in support of his argument. See Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1193-94 (9th Cir. 1998); Renteria v. Prudential Ins. Co. of America, 113 F.3d 1104, 1105-06 (9th Cir. 1997); Prudential Ins. Co. of America v. Lai, 42 F. 3d 1299, 1305 (9th Cir. 1994). However, Dodds acknowledges that the Fifth Circuit disagrees with the Ninth Circuit's interpretation of the

OWBPA and has held that (1) Congress did not intend the OWBPA to apply to arbitration agreements, but rather severance agreements; and (2) that the OWBPA protects only against wholesale waiver of substantive rights, not the waiver of a judicial forum in which to assert those rights. See Williams v. CIGNA Fin. Advisors, inc., 56 F.3d 656, 660-61 (5th Cir. 1995); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir.1991). This Court is required to follow Fifth Circuit precedent. Consequently, Dodds' claim that the agreement to arbitrate violates the OWBPA must fail.

CONCLUSION

Based on the foregoing analysis, Halliburton's motion to compel arbitration and dismiss or stay this action pending such arbitration is GRANTED. This action is DISMISSED, and Dodds shall pursue his claims against Halliburton. if at all, pursuant to the arbitration, agreement.

It is so ORDERED
Signed this 18th day of December, 2000.

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

Footnotes

[1] 'Section 1 of the FAA states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The Rojas Court interpreted this language as follows: "[T]he exclusionary clause of § 1 of the Arbitration Act should be narrowly construed to apply to employment contacts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are." 87 F.3d at 748 (quoting Asplundh Tree Expert Co. v. Bates, 71 F.3d 592 (6th Cir. 1995)). Dodds is not an employee involved in the movement of goods in interstate commerce. Consequently, he is not excluded from

FAA coverage under Section 1. See id.

[2] Dodds also requests that if this Court chooses to follow Fifth Circuit precedent over Ninth Circuit precedent that it delay ruling on the motion to compel arbitration until the Supreme Court has addressed Circuit City. The Court declines to do so, since it is bound by Fifth Circuit precedent until this precedent is overturned.

[3] Although Plaintiff denies signing or negotiating for the arbitration agreement, he fails to deny having received it.

[4] Halliburton also offers additional consideration such as $2,500 annually as reimbursement for legal fees incurred in connection with claims brought under the arbitration agreement.

CIVIL ACTION NO. V-00-96

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHER DISTRICT OF TEXAS VICTORIA DIVISION

LUIS PICOT,
Plaintiff,

v.

HALLIBURTON ENERGY SERVICES, INC.,
Defendant.

Entered: March 30, 2001

ORDER OF DISMISSAL

For the reasons stated in the Court's Order signed March 28, 2001 GRANTING Defendant's motion to compel arbitration (Dkt # 6), the above-styled action is hereby

DISMISSED.

SIGNED on this 29th day of March, 2001.

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

No. 01-40057

IN THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

RONALD G. DODDS,
Plaintiff-Appellant

v.

HALLIBURTON ENERGY SERVICES, INC.,
Defendant-Appellee.

No. 01-40462

LUIS PICOT,
Plaintiff-Counter Defendant-Appellant,

v.

HALLIBURTON ENERGY SERVICES, INC.,
Defendant-Counter Claimant-Appellee

Appeals from the United States District Court
For the Southern District of Texas
(V-00-CV-71 & V-00-CV-96)

Entered: October 18, 2001

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellants' motion for leave to file petition for rehearing out of time is GRANTED. IT IS FURTHER ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge